Office-Supreme Court, U.S.
FILED
MAY 23 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1965~~ 163

J. KENNETH EDLIN, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

EUGENE GRESSMAN
1730 K Street, N. W.
Washington, D. C. 20006

EDWARD L. GENN
Colorado Building
Washington, D. C. 20005

Counsel for Petitioner

May 23, 1966

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional and statutory provisions involved	3
Statement of the case	4
Reasons for granting the writ	11
1. The decision below raises an important and novel question as to the scope and application of the Speech or Debate Clause of the Constitution	11
2. The decision below, affirming the conviction of an aider and abettor while vacating the conviction of the principal and remanding for a new trial, conflicts with principles followed by this Court	16
3. The totality of prejudicial evidence introduced at petitioner's trial warrants the invocation of this Court's supervisory power over the administration of criminal justice in the federal courts	20
Conclusion	23
Appendix (opinion and judgment of Court of Appeals)	1a

CITATIONS

CASES:

Abrams v. United States, 327 F. 2d 898 (App. D.C.)	22
Anderson v. United States, 318 U.S. 350	14
Colosacco v. United States, 196 F. 2d 165 (C.A. 10)	18
Gebardi v. United States, 287 U.S. 112	14
Gober v. City of Birmingham, 373 U.S. 374	19
McDonald v. United States, 335 U.S. 451	14
Meredith v. United States, 238 F. 2d 535 (C.A. 4)	19
Michelson v. United States, 335 U.S. 469	21

Page

Morgan v. United States, 159 F. 2d 85 (C.A. 10) ... 18
Morrison v. California, 291 U.S. 82 14
Pierce v. United States, 86 F. 2d 949 (C.A. 6) 22
Shuttlesworth v. Birmingham, 373 U.S. 262 19
United States v. Johnson, 383 U.S. 169 .....2, 4, 5, 11, 12, 13, 14
United States v. Johnson, 215 F. Supp. 300 (D. Md.) 19
United States v. Lovely, 169 F. 2d 386 (C.A. 4) 22
United States v. Titus, 210 F. 2d 210 (C.A. 2) 19
United States v. Tomaiolo, 249 F. 2d 683 (C.A. 2) .. 22
Wason, Ex parte, L.R.4Q.B. 573 (1869) 15, 16

CONSTITUTION AND STATUTES:

Article I, Section 6, U.S. Constitution 3, 11, 16

18 U.S.C. § 281 .....3, 17, 18

18 U.S.C. § 371 4

MISCELLANEOUS:

Note, The Bribed Congressman's Immunity from Prosecution, 75 Yale L.J. 335 (1965) 16

Thomas, Freedom of Debate: Protector of the People or Haven for the Criminal?

3 The Harvard Review 74 (No. 3, Fall-Winter 1965) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

J. KENNETH EDLIN, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner herein, J. Kenneth Edlin, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on September 16, 1964, affirming petitioner's conviction for conspiracy to defraud the United States in violation of 18 U.S.C. § 371 and for aiding and abetting a violation of the "conflict-of-interest" statute, 18 U.S.C. § 281.

OPINIONS BELOW

The opinion of the Court of Appeals, reprinted in the Appendix hereto, is reported at 337 F. 2d 180. The

opinion of the District Court for the District of Maryland is reported at 215 F. Supp. 300.

JURISDICTION

The judgment of the Court of Appeals (Appendix hereto, p. 43a, *infra*) was entered on September 16, 1964. A timely petition for rehearing and/or rehearing en banc was filed by the petitioner, but the Court of Appeals withheld action thereon pending the resolution of the related certiorari proceeding in this Court in *United States* v. *Johnson,* 383 U.S. 169, decided on February 24, 1966. Thereafter, on March 24, 1966, the Court of Appeals summarily denied the petition for rehearing and/or rehearing en banc. On timely application, the Chief Justice of the United States on April 18, 1966, ordered that the time for filing this petition for writ of certiorari be extended to and including May 23, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Speech or Debate Clause of the United States Constitution, Art. I, § 6, bars the prosecution of a non-Congressman for conspiring with a Congressman to have the latter make a speech for compensation on the floor of the House of Representatives.*

---

* In the event that certiorari is granted as to this question, an additional question is presented and is preserved herewith for purposes of argument: Whether, if Art. I, § 6, does bar such a prosecution, the receipt of evidence concerning the speech was so prejudicial as to destroy petitioner's right to the unbiased consideration of the jury on the remaining counts of the indictment, thereby necessitating a new trial thereon as was ordered with respect to the Congressman.

2. Whether a conviction for aiding and abetting a Congressman in the receipt of compensation in violation of 18 U.S.C. § 281 can be sustained where the conviction of the Congressman as a principal under § 281 has been vacated and a new trial ordered.

3. Whether, in a federal criminal conspiracy trial, the repeated receipt of evidence concerning (a) the past and unrelated criminal record of the defendant, (b) the past and current investigations and complaints against the defendant with respect to unrelated matters, and (c) the adverse views and comments of Department of Justice officials with respect to the defendant, was in totality so prejudicial as to deprive the defendant of a fair trial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 6, of the United States Constitution provides in part:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

18 U.S.C. § 281, which was repealed subsequent to the commission of the acts involved in this case, provided in pertinent part:

> Whoever, being a Member of or Delegate to Congress or a Resident Commissioner, either be-

fore or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

18 U.S.C. § 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

SATEMENT OF THE CASE

In *United States* v. *Johnson*, 383 U.S. 169, this Court reviewed certain portions of the judgment below and affirmed the ruling that the Speech or Debate Clause of the Constitution, Art. I, § 6, bars the prosecution of ex-Congressman Johnson for allegedly conspiring to deliver for compensation a speech on the floor of the House of Representatives. This petition presents for review certain other portions of that same judgment, portions which affirmed the conviction of petitioner J. Kenneth Edlin on both the conspiracy and the aiding and abetting counts of the indictment.

Because the general nature and scope of this prosecution have been so recently under scrutiny by this Court, a detailed statement as to its thrust is unnecessary. Suffice it to say that the petitioner Edlin was charged, tried and convicted as (1) a co-conspirator with Congressman Johnson, under the conspiracy count, in the alleged scheme to have Johnson deliver for compensation a speech in the House of Representatives concerning the Maryland independent savings and loan business,[1] and (2) an aider and abettor of Johnson, under the seven substantive counts of the indictment, in the receipt of compensation in violation of 18 U.S.C. § 281, the federal conflicts of interest statute.

In the course of the prosecution and conviction of the petitioner under the conspiracy count, precisely the same evidence was introduced and considered by the jury as was introduced and considered with respect to Congressman Johnson. The speech itself was introduced. And, as summarized in this Court's *Johnson* opinion, 383 U.S. at 173-176:

> "Extensive questioning went on concerning how much of the speech was written by Johnson himself, how much by his administrative assistant, and how much by outsiders representing the loan company. The government attorney asked Johnson specifically about certain sentences in the speech, the reasons for their inclusion and his personal knowledge of the factual material supporting those statements. In closing argument

---

[1] Another facet of the alleged conspiracy concerned a scheme whereby two Congressmen—Johnson and Boykin—were to exert influence on the Department of Justice to obtain the dismissal of pending mail fraud indictments of First Colony Savings and Loan Association, its officers and the petitioner Edlin.

> the theory of the prosecution was very clearly dependent upon the wording of the speech. In addition to questioning the manner of preparation and the precise ingredients of the speech, the Government inquired into the motives for giving it."

No attempt was made to limit or confine the use of such testimony. It was used to secure the conviction of the petitioner Edlin as well as of Congressman Johnson and the other defendants under the conspiracy count. And the jury was in no way instructed to confine its consideration of such evidence as to the speech in evaluating the conspiracy guilt of any or all of the defendants; certainly no instruction was given by the judge that the jury should not consider the evidence regarding the speech in determining petitioner Edlin's guilt under the conspiracy count.

Indeed, the Government at no time has sought to distinguish between the various alleged co-conspirators in terms of the admissibility or use of the evidence concerning Johnson's speech in the House of Representatives. Nor has any argument ever been advanced by the Government that the constitutional problem stemming from the use of such evidence—the problem of the applicability of Article I, Section 6, of the Constitution—is any different as among the different co-conspirators. The first and only appearance of the idea that this evidence as to the speech was inadmissible with respect to Johnson alone, and that the constitutional provision pertained solely to the prosecution of Johnson, came in the *sua sponte,* unexpected and summary ruling of the Court of Appeals (see p. 18a, *infra*) that "as none of the privileges of Article I, section 6 pertain to the defendants who are not mem-

bers of Congress, their attack on the first count, unlike Johnson's, is not sustained."[2]

The Court of Appeals further held (see p. 42a, *infra*) that this "mass of evidence and comment" about the speech, "all inadmissible against Johnson, infected the jury's consideration of his innocence or guilt under the conflicts of interest counts." The judgment against Johnson was accordingly vacated and remanded for a new trial on the seven substantive counts involving receipt of payments in violation of 18 U.S.C. § 281. And this Court found under the circumstances "no occasion to review the Court of Appeals' assessment of the record in this respect." 383 U.S. at 186. But under its ruling that Article I, Section 6, in no way pertains to a non-Congressman like petitioner Edlin, the Court of Appeals made no assessment as to whether the introduction of the evidence regarding the speech infected the jury's consideration of Edlin's guilt under the conflicts of interest counts. Nor did the court below consider whether, in light of its vacating of Johnson's conviction as a principal in the conflicts of interest violations, the conviction of petitioner Edlin as an aider and abettor of those violations could stand.[3]

---

[2] The unexpected nature of this ruling, which had not been advanced by the Government or argued by any of the parties, prompted petitioner to file his rehearing petition in the court below. Action on that petition was withheld pending the decision of this Court in the *Johnson* case; the petition was thereupon summarily denied.

[3] The failure of the Court of Appeals to deal with the impact on an aider and abettor of a vacation of the conviction of the principal and a remand for a lew trial was one of the questions raised by petitioner in seeking rehearing below. The Court of Appeals without comment rejected the rehearing request.

Moreover, the Court of Appeals ruled (see pp. 40a-41a, infra), without elaboration and without reference to any specific incidents, that a "full" and "close" examination of the record failed to reveal the claimed "totality of prejudice" in the introduction of evidence against the petitioner Edlin. It thereby necessarily ruled that the combined impact of the following evidentiary incidents did not deprive the petitioner of a fair trial:

(1) One Charles Meyer, a Government witness and a federal parole officer, testified repeatedly over objections concerning (a) petitioner Edlin's unrelated and prior convictions and sentences (some of which occurred more than 20 years earlier), (b) Edlin's questioned activities in the unrelated Koruna Savings and Loan Association reorganization in 1950, and (c) the complaints of federal and state officials alleging "extreme indiscretion" by Edlin in the handling of his business affairs. Tr. 1827, 1860-1862, 1876-1883. In response to petitioner's objections to this testimony, the trial judge repeatedly ruled that evidence of such prior offenses or parole activities, however seemingly prejudicial, was admissible because of its relevancy to the alleged overt acts of the conspiracy.

(2) The then Attorney General, Robert F. Kennedy, testified for the Government and over petitioner's objections that (a) there was considerable derogatory information about petitioner Edlin in the Department of Justice files, (b) the then pending mail fraud indictment against Edlin was, in the Department's view, "a strong case," "well brought" and "should go forward," (c) Edlin's testimony before a grand jury investigating an unrelated matter involving James R. Hoffa was thought by the Department not to be "com-

pletely truthful," and (d) to answer questions about an unrelated allegation that Edlin had purchased a stolen Treasury bond would be getting "into a real can of worms." Tr. 1669-1690. The trial judge's response to petitioner's repeated motions for mistrial was to reaffirm the ruling that evidence of this type was relevant to the alleged overt acts of the conspiracy.

(3) Herbert J. Miller, Jr., then an Assistant Attorney General, testified for the Government that (a) Edlin had had difficulties with the postal inspection authorities on "more than one occasion," (b) Edlin had "also been convicted in the thirties" and had been associated with a midwest savings and loan association that had been placed in receivership, (c) Edlin was not the "type of individual" deserving of sympathetic treatment by the Department, (d) Edlin had been convicted on two or three prior occasions, and (e) the Department had a "good case" against Edlin on the mail fraud charges. Tr. 2035-2252. Once again, petitioner's motions for mistrial were denied on the theory that this kind of evidence might somehow be relevant to the alleged conspiracy.

(4) Prejudicial testimony concerning the petitioner was also given by numerous other Government witnesses, including such remarks as (a) the fact that Edlin was, at the time of the instant trial, under indictment in Montgomery County, Md., on a quite different charge, (b) the allegation that Edlin had purchased a stolen Treasury bond, (c) the fact that the First Colony Savings and Loan Association, allegedly controlled by Edlin, had been placed in receivership *after* the period of the alleged conspiracy, and (d) the claim that moneys paid to Johnson for his services came not from Edlin but from the savings and loan association.

Petitioner's objections to such testimony were overruled and mistrial motions were denied.

The reiterated objections by petitioner to evidence of this prejudicial nature were all premised on his contention that his character rather than his actions had thereby been put on trial. All such objections were summarily overruled. And the overrulings were unaccompanied by any effective cautionary instructions to the jury. When the Court of Appeals stated (p. 40a, *infra*) that "whenever the situation called for a specific instruction to the jury, appropriate instruction was given," it could only have been referring to certain instructions concerning hearsay statements. As to the *prejudicial* statements noted above, there was no effective instruction to the jury.

Finally, the Court of Appeals ruled (p. 39a-40a, *infra*) that the following statement in the Government's closing summary to the jury did not constitute an improper comment on petitioner Edlin's failure to take the stand:

> "Members of the Jury, the defendant Edlin has presented no defense in this case. He has presented no evidence to contradict the charges against him. He has produced no evidence to deny numerous statements made by many, many government witnesses. He has produced no evidence to deny the testimony of numerous witnesses of his various activities which clearly indicate beyond any doubt, Members of the Jury, his guilt of the charges in this indictment."

As a consequence of the Court of Appeals action, petitioner Edlin stands convicted on all eight counts—the conspiracy count and the seven aiding and abetting counts. That conviction has resulted in a sentence of

imprisonment for one year "as to each of Counts 1 to 8 inclusive, said terms of imprisonment to run concurrently." Tr. 104. In addition, he has been sentenced to "pay a fine of Two Thousand Dollars ($2,000.00) as to each of Counts Nos. 1 to 8, inclusive, said fines to be cumulative making a total fine of Sixteen Thousand Dollars ($16,000.00)." Tr. 104.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises an Important and Novel Question as to the Scope and Application of the Speech or Debate Clause of the Constitution.

In dealing with the instant prosecution for conspiracy, this Court in *United States* v. *Johnson,* 383 U.S. 169, has recognized that the Speech or Debate Clause of the Constitution, Art. I, § 6, at least when considered as to ex-Congressman Johnson, proscribes the evidence that was introduced concerning his speech in the House of Representatives and its motivations. The critical holding was expressed in these terms (383 U.S. at 184-185): "We hold that a prosecution under a general criminal statute dependent on such inquiries [into the speech and its motivations] necessarily contravenes the Speech or Debate Clause."

In that respect, the ruling of the court below was consistent with the conclusion reached by this Court. But the lower court's further ruling—which was not before this Court for review in *Johnson*[4]—that "none

[4] Petitioner filed an *amicus* brief in this Court in the *Johnson* case pointing out that his contention that the principles of the Speech or Debate Clause necessarily applied to him as an alleged co-conspirator of the ex-Congressman was still pending before the Court of Appeals on the rehearing petition. This Court, in recognition of that fact, noted that questions raised by the co-defendants Edlin and Robinson "have not been presented to us." 383 U.S. at 172-173, n. 3.

of the privileges of Article I, section 6 pertain to the defendants who are not members of Congress" (p. 18a, *infra*) raises a most significant constitutional question worthy of this Court's consideration.

That question, of course, relates to the scope and reach of the Speech or Debate Clause in the setting of a conspiracy charge involving both a Congressman and non-Congressmen where an illicit inquiry has been made into the Congressman's speech and its motivations. Does that Clause bar the entire conspiracy prosecution, even as to the co-conspirators who are not Congressmen? Or can the Clause be applied only as to the Congressman as co-conspirator, leaving the Government free to inquire into the speech and its motivations in order to convict the other co-conspirators?

An answer to this question is essential in order to remove the doubts now existing as to the scope of the Clause and the extent to which Congress and the courts may deal with alleged conspiracies of this nature. The *Johnson* decision has established the bounds of one important dimension of that Clause; this case presents another dimension, the precise measurement of which is as significant as the *Johnson* measurement. As the Solicitor General's petition for certiorari in the *Johnson* case pointed out (p. 7), the problem there was important because it "affects public confidence in Congressional debate—certainly a matter of great national significance." And the Solicitor General asked (p. 7) that the matter be resolved "so that Congress may establish such machinery as is appropriate to deal with matters of this kind." It is no less important, from the standpoints of public confidence in Congressional debate and the need for establishing appropriate

machinery, that a definitive resolution be made of the extent to which an inquiry into a Congressional speech and its motivations may be made in order to convict a Congressman's alleged co-conspirators. Since there are far more potential non-Congressional defendants than Congressional defendants who might be the subjects of conspiracy indictments of this nature, it becomes that much more appropriate to have this Court's answer to the problem.

The substantiality of the constitutional problem here presented may quickly be gleaned from the following considerations:

(1) The Speech or Debate Clause itself provides that a Senator or Representative "shall not be questioned in any other Place" without specification as to the circumstances under which that questioning takes place. In short, the language of the Clause affords no basis for assuming that such a questioning can occur in order to secure a conviction of non-Congressional conspirators. It prohibits broadly and without limitation any questioning of a Congressman and any inquiry into a Congressional speech or its motivations.

(2) The opinion of this Court in *Johnson,* as well as the opinion of the court below, speaks of the Speech or Debate Clause as one that proscribes the intensive judicial inquiry into the speech and the resulting evidence taken in the course of this prosecution under a general conspiracy statute. The conclusion "that a prosecution under a general criminal statute dependent on such inquiries necessarily contravenes the Speech or Debate Clause," 383 U.S. at 184-185, admits of no distinction in the application of the Clause as between the various defendants whose convictions rested upon

that inquiry and that evidence. In these circumstances, the impact of the Clause falls on the conspiracy prosecution as such—not upon a particular defendant.

(3) Moreover, as this Court noted (383 U.S. at 177), the conspiracy theory in this case was dependent "upon a showing that the speech was made solely or primarily to serve private interests, and that Johnson in making it was not acting in good faith." But that theory was as essential to the conspiracy conviction of the petitioner as it was to the conspiracy conviction of Johnson. And if the theory as to Johnson was constitutionally impermissible, it would not be any more permissible because the co-defendant happened to be a non-Congressman.[5]

(4) The prime purpose of the Clause is to preserve legislative freedom and to prevent intimidation by the executive and accountability before a possibly hostile judiciary. See 383 U.S. at 181. But that purpose is ill-served if the legislator is subject to judicial inquiry as a necessary part of a conspiracy prosecution against non-legislators. A Congressman may be as much if not more inhibited by the fear of judicial inquiry into his speeches and motivations where the criminal conspiracy prosecution is directed not at him but at his aides, his constituents, his friends, or others with whom

---

[5] If the conviction of one of two defendants charged with conspiracy fails for insufficiency of supporting evidence, the conviction of the other co-conspirator must also fail. See *Gebardi* v. *United States*, 287 U.S. 112, 123; *Morrison* v. *California*, 291 U.S. 82, 93. That principle would seem particularly relevant where the conviction of one defendant fails because the necessary supporting evidence is constitutionally proscribed. Cf. *McDonald* v. *United States*, 335 U.S. 451, 456; *Anderson* v. *United States*, 318 U.S. 350, 356-357.

he has had dealings. The evil of inhibition, in short, arises from the fact or threat of inquiry, not from the naming of a particular defendant whose guilt depends upon the making of such an inquiry. Thus if the prosecution necessarily is premised upon conducting an inquiry of this nature, the policy as well as the language of the Speech or Debate Clause forecloses the prosecution, whoever may be the named defendants. So to conclude, of course, is not to free the non-legislative defendants of amenability to law; they remain as always subject to laws and prosecutions for violations thereof (such as for bribery) which are not dependent upon the proscribed type of inquiry.

(5) Thus the ultimate answer to the question here posed may well be that given by the English tribunal in *Ex parte Wason*, L.R. 4 Q.B. 573 (1869), referred to by this Court, 383 U.S. at 183. There two members of the House of Lords and one non-member were charged with conspiracy to have untrue and damaging statements made in the House. The Queen's Bench ruled that such a charge was not "an indictable offense"—even as to the non-member—because of the illicit inquiry necessarily contemplated by the charge.

(6) Indeed, in his reply brief before this Court in the *Johnson* case (p. 3), the Solicitor General recognized that the foregoing considerations—which had been mentioned in petitioner's *amicus* brief before this Court—constituted the "logical conclusion" of any analysis which applied the Clause "whenever the motivation for making a speech is called into question." In effect, this Court had adopted just that analysis of the Clause, carefully limiting it to prosecutions under a general conspiracy statute that are dependent upon the

improper inquiry. And at least in this particular prosecution—where the theory of the conspiracy charge was the same as to all defendants and where precisely the same inquiry and the same evidence as to the speech and its motivations were essential to the convictions of all—the "logical conclusion" must be that the conspiracy charge as to petitioner Edlin was constitutionally impermissible.[6]

These, then, are the main considerations underlying the constitutional question here posed. The intrinsic importance of that question and the necessary implications of the *Johnson* decision warrant the grant of certiorari.

2. The Decision Below, Affirming the Conviction of an Aider and Abettor While Vacating the Conviction of the Principal and Remanding for a New Trial, Conflicts With Principles Followed by This Court.

The court below has created a legal anomaly in the disposition of petitioner's case, an anomaly so contrary to legal principles established by this Court and so contrary to the concepts of fair criminal justice as to call for corrective action by this Court.

As a result of the disposition of the various co-defendants' appeals by the court below, a disposition largely unaffected by this Court's judgment in the

---

[6] To date, apart from the ruling below and the Queen's Bench decision in *Ex parte Wason*, both judges and commentators have been silent concerning the scope of the Speech or Debate Clause concept beyond its obvious applicability to the legislative defendant. See, e.g., Thomas, *Freedom of Debate: Protector of the People or Haven for the Criminal?* 3 The Harvard Review 74 (No. 3, Fall-Winter 1965); Note, *The Bribed Congressman's Immunity from Prosecution*, 75 Yale L. J. 335 (1965).

Johnson case,[7] the following situation now exists with respect to the conflicts-of-interest violations under 18 U.S.C. § 281:

(1) The conviction of Congressman Johnson as the alleged principal or recipient of payments in violation of § 281 has been vacated and the matter remanded for a new trial. This action was premised on the Court of Appeals' belief (see p. 42a, *infra*) that the mass of evidence and comment concerning the Johnson speech, all inadmissible against Johnson and proscribed by the Speech or Debate Clause, "infected the jury's consideration of his innocence or guilt under the conflicts of interest counts."[8]

(2) At the same time, however, petitioner Edlin's conviction as an aider or abettor of Johnson's § 281 violations, as principal, has been affirmed. In other words, approval has been given to petitioner's conviction for aiding and abetting violations of law supposedly committed by one whose guilt has yet to be determined pursuant to a new trial.

It is elementary, however, that an aiding and abetting violation must be premised upon a determination

[7] This Court stated, 383 U.S. at 185, that the Court of Appeals' opinion could be read as dismissing the conspiracy count in its entirety as to Johnson. But the Court ruled that since the making of the speech was only a part of the conspiracy charge, the Government should not be precluded from a new trial on that count after purging therefrom all elements offensive to the Speech or Debate Clause. But in all other respects, the judgment below as to Johnson was left undisturbed by this Court.

[8] As indicated in the note to the first question presented in this petition, petitioner reserves the right to urge that, if the Speech or Debate Clause be deemed to outlaw the conspiracy charge as to him, the jury's consideration of the § 281 aiding and abetting charges against petitioner was likewise "infected."

that the principal offense has in fact been committed.[9] The fact must be established "beyond a reasonable doubt that the offense was committed by someone." *Colosacco* v. *United States,* 196 F. 2d 165, 167 (C.A. 10). Thus in the context of this case, it would be essential to establish by jury verdict that Johnson, as principal, did in fact "unlawfully, wilfully, knowingly and corruptly" receive compensation before the petitioner could stand convicted of the charge of "aiding, abetting, counselling, commanding, inducing and procuring the defendant Thomas F. Johnson" in the unlawful receipt of that compensation.[10]

But that essential predicate of an aiding and abetting conviction has been removed by the Court of Appeals' judgment. The jury's verdict as to whether an offense under § 281 actually occurred has been found to have been improperly influenced by the constitutionally proscribed evidence respecting the speech. That verdict has accordingly been set aside and a new trial has been ordered. Johnson must now be presumed innocent, a presumption that will remain in effect until a new jury finds that he did in fact violate § 281. But that new jury could find him innocent of the § 281 charges. In that event, it would be conclusively established that no offenses under § 281 occurred, Johnson being the only conceivable person capable of committing such offenses. How, then, can an aiding and abetting conviction now be affirmed when the principal offense has not been and may never be established?

---

[9] "One cannot aid and abet in the commission of a crime unless there is another who has committed the offense." *Morgan* v. *United States,* 159 F. 2d 85, 87 (C.A. 10).

[10] This aiding and abetting language appears in all seven of the § 281 counts against the petitioner.

This Court's action in *Shuttlesworth* v. *Birmingham,* 373 U.S. 262, 265, provides the only possible answer to that question. There the Court had found in a companion case, *Gober* v. *City of Birmingham,* 373 U.S. 374, that the conviction of certain persons for criminal trespass on private property was improper by virtue of the Equal Protection Clause of the Fourteenth Amendment. The petitioners in the *Shuttlesworth* case had been convicted for inciting, aiding and abetting those charged with trespass in the *Gober* case. This Court concluded, 373 U.S. at 265, that "Since the convictions in *Gober* have been set aside, it follows that the present petitioners did not incite or aid or abet any crime, and that therefore their own convictions must be set aside." The failure of the court below to apply that conclusion so as to set aside petitioner's conviction as an aider and abettor must be deemed to conflict with the *Shuttlesworth* decision.

In sum, the voiding of Johnson's conviction as principal makes it legally impossible to sustain an aiding and abetting conviction at this time. See *United States* v. *Titus,* 210 F. 2d 210, 215 (C.A. 2).[11] That indeed was the pre-trial ruling in this instant case, *United States* v. *Johnson,* 215 F. Supp. 300, 214, fn. 15 (D.C. Md.): "A charge against an alleged aider and abettor must fall if no sufficient charge is made against the principal."

In the exercise of its supervisory power over the administration of criminal justice in the federal courts,

---

[11] In the *Titus* case, the Second Circuit ruled that if the person charged as principal in the alleged misapplication of bank funds be found not guilty then the individual charged as an aider and abettor was equally not guilty. See also *Meredith* v. *United States,* 238 F. 2d 535, 542 (C.A. 4).

this Court should order the vacating of the aiding and abetting conviction of the petitioner. Simple justice, as well as the principles recognized and applied in the *Shuttlesworth* case, requires that a definitive and untainted resolution of the principal's guilt precede or accompany any final determination of the guilt of an alleged aider or abettor.

3. The Totality of Prejudicial Evidence Introduced at Petitioner's Trial Warrants the Invocation of This Court's Supervisory Power Over the Administration of Criminal Justice in the Federal Courts.

There have been many claims that the introduction of prejudicial testimony has resulted in an unfair trial. Such claims are rarely sustained. But the claim that is made here is not of the routine variety; nor is it lightly advanced. It arises out of a trial atmosphere most conducive to the germination and growth of prejudicial evidence—a long, complicated, highly publicized conspiracy trial. And it is not unfair to say, on the basis of the entire record before this Court, that seldom if ever has a federal conspiracy trial involved so extensive an accumulation of prejudicial testimony against one defendant.

This petitioner, who did not take the stand, was in reality tried not on the charges against him but on the allegations of witnesses respecting his past criminal record, his past reputation and his past conduct. Over and over again these witnesses—including the Attorney General of the United States—were allowed to besmirch the character of this petitioner. They repeatedly testified as to his long-past prior convictions and his alleged parole "indiscretions." They said that, in the opinion of the Department of Justice, he had not been "completely truthful" in an unrelated Hoffa grand jury in-

quiry and that he was not the "type of individual" deserving of sympathetic treatment by the Department. They mentioned that he was, at the time of this trial, under indictment in Montgomery County, Md., on an entirely separate matter. Many of the statements were admittedly untrue in whole or in part, or consisted of mere rumor.

Yet all of these items were placed before the jury on the basis of their asserted relevance and probative relationship to the conspiracy charges. And in his summation to the jury, the prosecutor was able to capitalize on this testimony, pointing out that the petitioner "has presented no defense" and "has produced no evidence to deny the testimony of numerous witnesses of his various activities which clearly indicate . . . his guilt of the charges in this indictment."

But this Court's decision in *Michelson* v. *United States,* 335 U.S. 469, 475-476, conclusively demonstrates that, however probative such prejudicial evidence may be thought to be, the law

> "... simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its

> disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

In fact, any one of the many prejudicial statements would be sufficient to warrant a mistrial or a reversal of a conviction, particularly those dealing with past and unrelated criminal prosecutions. See *United States* v. *Lovely,* 169 F. 2d 386 (C.A. 4); *United States* v. *Tomaiolo,* 249 F. 2d 683 (C.A. 2); *Abrams* v. *United States,* 327 F. 2d 898 (App. D.C.). Not even a prompt admonition to the jury to disregard such statements, had one been given in this case, would serve to undo the prejudicial impact. *Pierce* v. *United States,* 56 F. 2d 949, 952-953 (C.A. 5). But when all of the prejudicial statements uttered in this trial and all the repetitions thereof are combined together, there can be no conclusion other than that the spirit and the rule of the *Michelson* decision have been violated.

As so often is true with respect to purely prejudicial testimony, the evidence of that nature in this case has not been claimed to be necessary to the establishment of any aspect of the Government's case. The only conceivable purpose of introducing it was to suggest to the jury that it could infer guilt at this trial from past convictions, past character and an unrelated pending indictment. That is precisely what made this trial unfair.

So egregious was the unfairness marking petitioner's trial as to require review and action by this Court. The court below failed to assess the record in the light of the prejudicial impact of particular items or to document its generalized conclusion that "in the totality of the trial we perceive no unfairness." See p. 41a, *infra.* The judgment below thus lacks the weight it

might otherwise have in assuring this Court that there has been no maladministration of federal criminal justice. The lower court's imprecise and vague treatment of this most serious problem serves to augment the need for the full exercise of this Court's supervisory powers.

CONCLUSION

For the various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE GRESSMAN
1730 K Street, N. W.
Washington, D. C. 20006

EDWARD L. GENN
Colorado Building
Washington, D. C. 20005
Counsel for Petitioner

May 23, 1966